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No. 90-618

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

TOLEDO BLADE COMPANY,
Petitioner,
v.
TOLEDO TYPOGRAPHICAL UNION NO. 63,
and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for Leave to Intervene and Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Toledo Typographical Union is the exclusive representative of an appropriate collective bargaining unit of Toledo Blade Company employees. Negotiations over a new collective bargaining agreement were brought to an impasse by Toledo Blade's demand that the employer be allowed to deal directly with the employees about retirement incentives and to exclude the Union from those individual negotiations. Pet. App. 1A-2A.

The Union filed unfair labor practices charges with the National Labor Relations Board alleging that, by insisting as a condition of agreement on the right to bargain

directly with individual employees, Toledo Blade had violated § 8(a)(5) of the National Labor Relations Act, as amended. Finding merit in the Union's claim, the General Counsel of the National Labor Relations Board issued a complaint charging Toledo Blade with having failed to bargain in good faith. Pet. App. 3A.

Over a dissent by Chairman Stephens, the NLRB dismissed the General Counsel's complaint. Pet. App. 5B. The Board majority concluded that the employer's demand for direct dealing was a mandatory subject of bargaining, over which a party to collective bargaining could insist to impasse. Pet. App. 3B-4B. In his dissenting opinion, Chairman Stephens maintained that Toledo Blade's proposal for individual bargaining was a permissive subject of bargaining under *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). Pet. App. 13B-16B.

The Union petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of the Board's decision. In a unanimous decision, a panel of that court (D.H. Ginsburg, Sentelle & Thomas, JJ.) granted the Union's petition for review. Pet. App. A. In agreement with Chairman Stephens's dissenting opinion, the court of appeals concluded that Toledo Blade's direct dealing proposal is a permissive subject of bargaining under *Borg-Warner*. Pet. App. 8A.

The court below remanded this case to the Board, with directions to take further action consistent with court's conclusion that Toledo Blade had violated § 8(a)(5) of the NLRA. Pet. App. 9A. The NLRB accepted the court's remand, and did not petition for a writ of *certiorari*.

Toledo Blade, *which did not intervene in the proceedings before the court of appeals*, has moved for leave to intervene in this Court for purposes of filing a petition for *certiorari*, and has, at the same time, conditionally filed such a petition. Pet. 6.

ARGUMENT

In point 1 below, we show that Toledo Blade's motion for leave to intervene should be denied. In point 2 below, we show that, if intervention is allowed, the petition for *certiorari* should be denied.

I. THE MOTION FOR LEAVE TO INTERVENE SHOULD BE DENIED.

(a) "Under § 1254(1) of the Judicial Code, only a 'party' to a case in the Court of Appeals may seek review here." *International Union, U.A.W. v. Scofield*, 382 U.S. 205, 208-209 (1965) (footnote omitted). That requirement is a statutory limit on the Court's jurisdiction. *Id.* at 208.[1]

Toledo Blade could have intervened in the proceedings below *as a matter of right. International Union U.A.W. v. Scofield, supra*, 382 U.S. at 212-217.[2] At no point in the proceedings below did Toledo Blade seek to do so.[3]

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[1] *Scofield* addressed the right of a successful party before the NLRB to intervene in a court of appeals proceeding challenging the Board's decision. 382 U.S. at 207. Because the union petitioner in that case had sought and been denied intervention in the court of appeals, the Court faced "[a] threshold question concern[ing] [its] jurisdiction to grant *certiorari*" on a petition filed by a non-party. *Id.* at 208. The Court recognized that as a non-party the union "would not have been entitled to file a petition to review a *judgment on the merits* by the Court of Appeals," but held that, on the union's petition, "§ 1254(1) permits us to review the *orders denying intervention.*" *Id.* at 209 (emphasis added).

[2] We note that intervention at the beginning of those proceedings would have permitted Toledo Blade to protect its rights without any commitment to active participaion in he case. *See* D.C. Cir. Rule 11(e)(3).

[3] Even though Toledo Blade did not take the simple step of intervening within the time allowed by Rule 15(d), F.R.A.P., the employer could have requested intervention in the court of appeals after entry of the judgment. *See* Rules 2 & 26(b), F.R.A.P. This Court has held that such post-judgment intervention for the purpose

Rather than seeking party status through the methods set out in the Rules, Toledo Blade requests leave to intervene in this Court in order to file a petition for *certiorari*. With a single narrow exception—not applicable here—this Court does *not* permit a person affected by a proceeding to lay back in that way and enter its first appellate appearance in this Court.

(b) So far as our research shows, there are only two cases in which a non-party has been permitted to intervene in this Court to file a petition for *certiorari* under § 1254(1). *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968); *Pyramid Lake Paiute Tribe of Indiana v. Truckee-Carson Irrigation District*, 464 U.S. 863 (1983).

In both cases, the petitioner had unsuccessfully sought to intervene in the lower courts before seeking to intervene in this Court. *Banks v. Chicago Grain Trimmers Ass'n*, Oct. Term 1967, No. 59, Petition for Leave to Intervene and Petition for a Writ of *Certiorari* 9-10; *Pyramid Lake Paiute Tribe of Indiana v. Truckee-Carson Irrigation District*, No. 82-1723, Petition for Leave to Intervene and Petition for a Writ of *Certiorari* 10.

And in both cases, the United States, which had represented the interests of the petitioners in the lower courts, filed a brief in this Court supporting intervention. *Banks v. Chicago Grain Trimmers Ass'n*, Oct. Term 1967, No. 59, Memorandum for the Deputy Commissioner (Department of Labor) 2-3; *Pyramid Lake Paiute Tribe of Indiana v. Truckee-Carson Irrigation District*, No. 82-1723, Brief for the United States in Response to Petition to Intervene and in Opposition to Petition for a Writ of *Certiorari* 10-11 & 13-14.[4]

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appeal is perfectly appropriate. *United Airlines Inc. v. McDonald*, 432 U.S. 385, 395-396 & n.16 (1977).

[4] In *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969), a non-party was permitted to intervene to file a petition of *certiorari*

In *Banks*, the Court requested that the Solicitor General file a brief in response to the petitions to intervene and for *certiorari*. 386 U.S. 1002 (1967). Supporting the petitioner's request to intervene, the Solicitor General argued that the petitioner had been the real party in interest in the lower courts, and thus was a "party" within the meaning of 28 U.S.C. § 1254(1). Memorandum for the Deputy Commissioner (Department of Labor) 2-3.[5] The Solicitor General also argued that "the petition could be viewed as seeking review not only of the court of appeals' judgment but also of the refusal to permit her to intervene," and that the Court's jurisdiction to review the lower court's denial of intervention would extend to the merits of the lower court's decision. *Id.* at 3 n.1. The Court granted the motion to intervene and the petition for *certiorari*. 389 U.S. 813 (1967).[6]

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pursuant to § 1257 of the Judicial Code, which differs from § 1254 in not expressly requiring that a "party" file the petition. Equally to the point, *Hunter* is essentially identical to *Banks* and *Pyramid Lake Paiute Tribe* in that the petitioner had unsuccesssfully sought to intervene in the lower courts and the government respondent consented to the petitioner's intervention in this Court. *See also New York v. Smith*, 469 U.S. 1227 (1985) (state attorney general permitted to intervene to file a petition for *certiorari* pursuant to § 1257 where the county district attorney, a party to the criminal prosecution, also filed a petition for *certiorari*).

[5] *Banks* began as a suit against the Deputy Commissioner of Labor to set aside an award of death benefits under the Longshoremen's and Harbor Workers' Compensation Act, and, as the Solicitor General explained, "the procedure whereby the award is defended by the government in the courts is not designed to vindicate any independent governmental interest, but, rather, to remove the burdens of litigation from the shoulders of the compensation claimants, who are rarely individuals of means." *Id.* at 3.

[6] The Solicitor General advanced similar arguments on behalf of intervention in *Pyramid Lake Paiute Tribe of Indiana v. Truckee-Carson Irrigation District, supra.* The Solicitor General noted that intervention had been denied by the lower courts on the mistaken grounds that the petitioner did not have an interest in the proceedings, Brief for the United States 10-11, and also noted that

(c) The narrowness of the *Banks* exception is demonstrated by the Court's denial of the union's request to intervene to file a petition for *certiorari* in *Local Union No. 246, Laborers' Int'l Union v. Bickerstaff Clay Products Co.*, —— U.S. ——, 110 S.Ct. 292 (1989). The petitioner in *Bickerstaff* argued that, as the charging party before the NLRB, the union stood in the same position as the petitioner in *Banks*. Because the union's charge in *Bickerstaff* was sustained by the Board, the NLRB General Counsel continued to prosecute the union's case in the court of appeals, arguably making the union the real party in interest to those proceedings. Petition for Leave to Intervene 8-12. Moreover, the question presented by the union's *certiorari* petition in *Bickerstaff* was identical to the question then pending before the Court in *NLRB v. Curtin Matheson Scientific, Inc.*, —— U.S. ——, 110 S.Ct. 1542 (1990).

But—in contrast to *Banks* and *Pyramid Lake Paiute Tribe*—in *Bickerstaff* the union had *not* attempted to intervene in the lower court, a fact noted by the Solicitor General in opposing intervention. Brief for the National Labor Relations Board in Opposition 6. The Court denied both the request to intervene and the *certiorari* petition (thereby refusing to hold the union's petition pending the decision in *Curtin Matheson*). 110 S.Ct. 292.

(d) Toledo Blade's argument for intervention is not nearly as strong as the intervention argument advanced by the union—and rejected—in *Bickerstaff*. The pro-

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intervention had been denied by the lower courts in part on the alternative ground that the petitioner's interests were represented by the United States, *id.* at 13-14. As this was no longer so, because of the government's decision not to petition for *certiorari*, the Solicitor General suggested that intervention by the petitioner for the purpose of filing a petition for *certiorari* was appropriate. *Id.* While consenting to intervention, the United States opposed the petition for *certiorari*. The Court allowed intervention and the filing of the petition, but denied the writ. 464 U.S. 879 (1969).

ceedings below were *not* brought on behalf of Toledo Blade. Indeed, those proceedings began as—and on remand have once again become—a prosecution of Toledo Blade for unfair labor practices. Moreover, here, as in *Bickerstaff*, *no* attempt to intervene was made in the court below. Finally, as we demonstrate in point 2, the question presented by Toledo Blade's *certiorari* petition is *not* one presently before the Court or otherwise worthy of its consideration.

Toledo Blade suggests that if its intervention motion is denied the employer will "circuit shop" by petitioning the Sixth Circuit to review the Board's decision on remand. Pet. 6. The wasted judicial effort Toledo Blade warns of, should the employer take this course, *id.*, will not occur. Even if Toledo Blade petitions for review in the Sixth Circuit, that court will follow the District of Columbia Circuit's decision as the law of the case. *See, e.g., Indianapolis Power & Light Co. v. NLRB*, 898 F.2d 524, 528-529 (7th Cir. 1990). *See also Skil Corp. v. Millers Falls Co.*, 541 F.2d 554, 558 (6th Cir. 1976). Aside from this empty threat, no other basis has been advanced by Toledo Blade for this Court to take the extraordinary step of allowing the employer to intervene here for the purpose of filing a petition for *certiorari*.

II. THE PETITION FOR *CERTIORARI* SHOULD BE DENIED.

The question presented by the Toledo Blade's *certiorari* petition—whether an employer may insist on bargaining over a proposal giving it the right to engage in direct negotiations with individual employees over retirement incentives—is answered by the plain language of the statute. As the court of appeals has correctly applied the plain statutory language, there is no call for this Court to review the lower court's decision, even if it did have jurisdiction to do so.

Section 7 of the Act states that "[e]mployees shall have the right . . . to *bargain collectively through representatives of their own choosing. . . .*" 29 U.S.C. § 157 (emphasis added). Section 9(a) provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the *exclusive representatives* of all the employees in such unit *for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .*" 29 U.S.C. § 159(a) (emphasis added). Section 8(a)(5) makes it an unfair labor practice for an employer to "refuse to *bargain collectively with the representatives of his employees. . . .*" 29 U.S.C. § 158(a)(5). And § 8(d) defines "to bargain collectively" as "the performance of the mutual obligation of the employer and the *representative of the employees* to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ." 29 U.S.C. § 158(d) (emphasis added).

Consistent with this statutory language, this Court has held that an employer may *not* bargain to impasse over a demand that "substantially modifies the collective-bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees [, and] enables the employer, in effect, to deal with its employees rather than with their statutory representative." *NLRB v. Borg-Warner*, *supra*, 356 U.S. at 350.[7] As Judge Douglas Ginsburg explains, in his opinion for the court below, Toledo Blade's demand for individual bargaining is more intrusive upon the statutory system of collective bargaining than the ballot clause demand held unlawful in *Borg-Warner*:

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[7] The specific demand at issue in *Borg-Warner* was for a "ballot clause" requiring the union to hold an advisory vote on the employer's last offer to settle any non-arbitrable grievance before calling a strike. 356 U.S. at 345-346.

> While the Court in *Borg-Warner* observed that the ballot clause would "enable the employer, *in effect*, to deal with its employees rather than with their statutory representative, 356 U.S. at 350 (emphasis added), Toledo Blade's clause would authorize it *in fact* to deal with its employees, to the exclusion of the Union, in negotiating the terms and conditions of retirement. [Pet. App. 7A (emphasis in original).]

Toledo Blade argues that it is privileged to demand individual bargaining as a substitute for collective bargaining under *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952). Pet. 8-11. However, as the court of appeals notes in distinguishing that case, *American National Insurance* involved an employer demand for a management rights clause giving it initial responsibility for certain matters, such as work scheduling—a substantive request the Court concluded is consistent with the Act—and *not* an employer demand to engage in direct dealing with individual employees, a method of proceeding that is contrary to the Act. Pet. App. 6A-7A.

Finally, Toledo Blade charges that the court below disregarded the NLRB's primary authority for determining mandatory subjects of bargaining. Pet. 9-10. That is patently untrue. The court of appeals' opinion begins by recognizing the Board's authority, and overturned the Board's decision only after concluding that "the Board's determination is 'fundamentally inconsistent with the structure of the Act,' . . . ." Pet. App. 3A-4A, quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965). In reaching this conclusion, the court of appeals was in agreement with the NLRB's Chairman, who found that "the essence of the [Toledo Blade's] proposal was the substitution of an individual negotiating process for the collective process contemplated in the Act." Pet. App. 18B (dissenting opinion; footnote omitted).

CONCLUSION

The petition for leave to intervene and, if reached by the Court, the petition for *certiorari* should be denied.

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